United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2361

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P/S.

To be Argued by
MARGERY EVANS REIFLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
JAMES W. ROGERS,

Petitioner-Appellant,

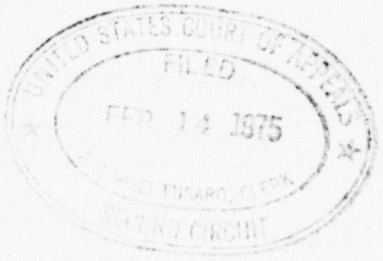
-against-

J. EDWIN LAVALLEE, WARDEN,

Respondent-Appellee.

[APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA ex rel. JAMES W. ROGERS,

Petitioner-Appellant,

-against-

J. EDWIN LAVALLEE, WARDEN,

Respondent-Appellee.

----------X

Docket No. 74-2361

[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Was the State of New York collaterally estopped from retrying petitioner for kidnapping in the first degree (abduction plus death of the victim) when the jury at his first trial had rendered a confused and inconsistent verdict as to his guilt or innocence of second degree kidnapping (simple abduction)?

2. When the trial judge at petitioner's first trial sua sponte declared a mistrial on the charge of kidnapping in the first degree, was his reprosecution for that crime barred by the double jeopardy clause?

Preliminary Statement

Petitioner appeals from an order of the United States District Court for the Northern District of New York (Port, J.), dated August 29, 1974, which denied petitioner's application for a writ of habeas corpus. By an order dated August 29, 1974 Judge Port granted a certificate of probable cause and counsel was assigned by this Court on November 1, 1974 (Feinberg, J.).

Statement of the Case

Petitioner is presently confined in Clinton Correctional Facility, Dannemora, New York, pursuant to a judgment of conviction rendered by the Supreme Court, County of Kings, after a trial by jury. Petitioner was convicted of the crime of kidnapping in the first degree and was sentenced to a term of imprisonment of twenty years to life on July 14, 1970 (Gittleson, J.).

On appeal, the judgment of conviction was unanimously affirmed without opinion by the Appellate Division. People v. Rogers, 36 A D 2d 1024 (2d Dept. 1971). Leave to appeal to

the Court of Appeals was denied on July 6, 1971 (Gibson, J.). Petitioner's application for a writ of certiorari was denied by the United States Supreme Court. 405 U.S. 956 (1972).

A. State Court Trials

In 1969 petitioner was indicted by a Kings County grand jury in connection with the abduction, sexual abuse, and death of an eighteen month-old baby girl. Appellant was charged with (1) felony murder (2) murder (3) kidnapping in the first degree (abduction plus restraint for more than twelve hours with intent to inflict physical injury and to abuse and violate sexually) and (4) kidnapping in the first degree (abduction plus death of the victim during abduction or before return to safety). The relevant portions of the indictment read as follows:*

* The first two counts of the indictment charged felony murder and murder. Petitioner was acquitted of these charges, and they are not at issue in this proceeding.

"THIRD COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of KIDNAPPING IN THE FIRST DEGREE, committed as follows:

The defendant, on or about and between January 8, 1969, and January 9, 1969, in the County of Kings, did abduct DELIA MOTT and did restrain the said DELIA MOTT for a period of more than twelve hours with intent to inflict physical injury upon the said DELIA MOTT and to violate and abuse her sexually."

"FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of KIDNAPPING IN THE FIRST DEGREE, committed as follows:

The defendant, on or about and between January 8, 1969, and January 9, 1969, in the County of Kings, did abduct DELIA MOTT who died during such abduction and before she was able to return and to be returned to safety,"*

* These two counts cover two types of abduction constituting first degree kidnapping under New York Law. Penal Law §135.25(2)(a) and § 135.25(3). In the interest of brevity, kidnapping in the first degree as charged in the third count will be referred to as abduction plus sexual abuse; kidnapping in the first degree as charged in the fourth count will be referred to as abduction plus death.

Petitioner's trial commenced on September 24, 1969 and on October 21, 1969, following several weeks of testimony, the trial court charged the jury on each of the four counts of the indictment. As to both counts 3 and 4 (the kidnapping in the first degree counts), the judge also instructed the jurors that they could consider whether petitioner was guilty of kidnapping in the second degree (simple abduction, Penal Law § 135.20) if they found him innocent of first degree kidnapping as charged in these counts.

After charging the jury on count 3, kidnapping in the first degree (abduction plus sexual abuse), the judge instructed the jury that they could consider the crime of kidnapping in the second degree if they found petitioner innocent of kidnapping in the first degree. The Court stated:

> "You must find all these elements have been proven to you beyond a reasonable doubt in order to convict the defendant of the crime of kidnapping in the first degree under the third count; otherwise you must acquit the defendant and proceed to consider whether defendant committed the crime of kidnapping in the second degree.
>
> "Section 135.20 of the Penal Law states, 'A person is guilty of kidnapping in the second degree when he abducts another person.'

"Now, I have just explained the definition of abduct stated in the law and therefore the only element necessary to convict the defendant of this crime is to determine whether the person Delia Mott was abducted.

"If you find beyond a reasonable doubt that the defendant did abduct Delia Mott, then you must convict him of the crime of kidnapping in the second degree, but on the other hand if you believe that the People have not proven beyond a reasonable doubt the charge in the second degree, then you must acquit the defendant and proceed to the fourth and final count of the indictment." (T. 1531-32).*

The Court then charged the jury on kidnapping in the first degree as charged in the fourth count of the indictment (abduction plus death) (T. 1532-33) and instructed that they again consider kidnapping in the second degree if they acquitted on first degree (T. 1533-34). At no point during the charge did petitioner's trial counsel (Mr. Brackley) raise any objection to the instructions. At the end of the charge the Court asked if there were any exceptions to the charge and petitioner's attorney replied "No exceptions" (T. 1573); in response to the Court's inquiry "Any requests?", Mr. Brackley said "No." (T. 1574).

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* All numbers following the letter "T." refer to the portion of petitioner's state court trial transcript submitted to this Court as an exhibit.

The jury deliberated for the rest of the day and resumed their deliberations the next morning. On two occasions the jury requested that the Court explain kidnapping in the first degree and kidnapping in the second degree (T. 1580, 1588) and the Court did so (T. 1580-85, 1588-91). The jury then returned with a verdict of acquittal on the first three counts. As to the third count (abduction plus sexual abuse), the jury announced a verdict of not guilty as to kidnapping in the first degree and kidnapping in the second degree (T. 1593).

As to the fourth count (kidnapping plus death), the jury announced it was deadlocked as to first and second degree kidnapping (T. 1593-94). The judge then requested that the jury return for deliberations on the fourth count, stating:

> "All right, Members of the Jury, as to the fourth count, the Court is going to return you for deliberation. We have been on this trial for 19 days, and the Court feels you should make every possible effort to reach a decision one way or the other, so you are to be returned for further deliberation..." (T. 1594).

The jury refused an offer to recess for dinner and resumed deliberation (T. 1594-95). When the jury again returned to say that it was deadlocked on the fourth count, it was

polled. The judge found that the jury did not agree, discharged them, and restored the fourth count of the indictment.

> "All right. The Court finds that the jury does not agree. I will, on that basis, discharge the jury and restore the fourth count of the indictment to the trial calendar, and the jury is discharged with thanks." (T. 1598).*

Petitioner's counsel raised no objection to the discharge of the jury or restoration of the fourth count.

Alleging his constitutional right against double jeopardy, petitioner then moved in the Appellate Division, Second Department for a writ of prohibition to prevent his retrial on the fourth count of the indictment. The motion was denied without prejudice to its renewal at trial. The motion was again denied by the trial court. Petitioner was then retried on the fourth count (abduction plus death) and found guilty of kidnapping in the first degree after a trial by jury in the Supreme Court, County of Kings (ante at 2-3). He is presently confined pursuant to that conviction.

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* Section 428(2) of the N.Y. Code Crim. Proc. (now N.Y. Crim. Proc. Law § 310.60[1][a]), which governed during petitioner's trial, authorized the trial court to discharge the jury when after a reasonable time they declared themselves unable to agree. Although the Code does not use the word "mistrial", for the purposes of conformity respondent will adopt petitioner's nomenclature and refer to the discharge as a mistrial.

B. First Federal Habeas Corpus Application

In July, 1971 petitioner applied for habeas corpus relief in the United States District Court for the Northern District of New York. He alleged that his constitutional right against double jeopardy had been violated. Petitioner claimed that his second trial was prohibited because 1) he was acquitted of second degree kidnapping (simple abduction) at his first trial under count three and thus could not later be tried for kidnapping in the first degree (abduction plus death) since abduction was a necessary element already resolved in his favor and 2) the judge at his first trial improperly declared a mistrial. His petition was denied by Judge Port on August 31, 1971 on the ground that it failed to allege sufficient supporting facts.

On appeal, this Court remanded the case to the District Court with orders to dismiss the petition without prejudice for exhaustion of state remedies. United States ex rel. Rogers v. LaVallee, 463 F. 2d 185 (2d Cir. 1972). As to petitioner's first claim, this Court found that although a double jeopardy claim had been raised in the state courts, this precise claim was never properly presented nor was a full record before the courts. This Court said:

> "It is arguable that we should nevertheless decide the effect of Ashe on appellant's second trial because

> appellant did raise a double jeopardy issue in the state courts. But because the crime involved is so repulsive, the issue of state-federal relationship so delicate, and the double jeopardy claim so unusual and not without difficulty, we believe that the state courts should have the opportunity of making the first determination of the precise legal issue on a full record." Id. at 187.

There was no record of any attempt by petitioner to present his second claim in the state courts. Although the record indicated that this claim was "a weak one on the merits" (id.), this Court ordered exhaustion on that claim as well.

C. State Court Postconviction Proceedings

Petitioner then brought a postconviction proceeding in the state court, presenting the two issues raised in his federal habeas corpus petition. His application was denied by the Supreme Court, County of Kings (Damiani, J.) on February 8, 1973.* Permission to appeal the order of denial was denied by the Appellate Division, Second Department, on April 4, 1973. Petitioner has now complied with the exhaustion requirement of the federal habeas corpus statute. 28 U.S.C. § 2254.

* For this Court's convenience, a copy of the decision is annexed hereto as an exhibit.

D. Second Federal Habeas Corpus Application

Petitioner then re-presented his two claims to the District Court, which assigned counsel. On August 29, 1974 Judge Port again denied petitioner's habeas corpus application.

As to petitioner's first claim, the District Court held that the jury's verdict must be considered in its entirety. The District Court said that the jury could not have properly considered second degree kidnapping (simple abduction) and reached a verdict of not guilty under the third count and a deadlock under the fourth count. Concluding that the jury returned a "confused, inconsistent and repugnant verdict" and did not reach a "dispositive, adequate or accurate finding as to petitioner's guilt or innocence of kidnapping 2nd degree", the Court said that the State should not be prevented by double jeopardy or collateral estoppel from retrying petitioner under count four. The Court also noted that there had been no objection by trial counsel to the declaration of the mistrial, thereby allowing the confused and inconsistent determination to stand uncorrected.

As to petitioner's claim that the judge at his first trial improperly declared a mistrial, the District Court reviewed the record, noting the length of the trial and deliberations; the jury's request for additional instructions; and

petitioner's failure to object to the mistrial. The Court found no abuse of discretion in the declaration of a mistrial.

Statutes Involved

New York Penal Law § 135.25 reads in relevant part:

> § 135.25 Kidnapping in the first degree
>
> A person is guilty of kidnapping in the first degree when he abducts another person and when:
>
> * * *
>
> 2. He restrains the person abducted for a period of more than twelve hours with intent to:
> (a) Inflict physical injury upon him or violate or abuse him sexually; or
>
> * * *
>
> 3. The person abducted dies during the abduction or before he is able to return or to be returned to safety.
>
> * * *

New York Penal Law § 135.20 reads in relevant part:

> § 135.20 Kidnapping in the second degree
>
> A person is guilty of kidnapping in the second degree when he abducts another person.

The word "abduct" is defined in New York Penal Law § 135.00(2):

> § 135.00 Unlawful imprisonment, kidnapping and custodial interference; definition of terms
>
> * * *
>
> 2. "Abduct" means to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly physical force.

POINT I

UNDER THE UNIQUE CIRCUMSTANCES OF PETITIONER'S FIRST TRIAL, IT CANNOT BE SAID THAT THE JURY ACQUITTED HIM OF SECOND DEGREE KIDNAPPING; ACCORDINGLY HIS RETRIAL FOR KIDNAPPING IN THE FIRST DEGREE DID NOT VIOLATE THE CONSTITUTIONAL PROSCRIPTION AGAINST DOUBLE JEOPARDY.

It is petitioner's contention that his acquittal of kidnapping in the second degree under count three of the indictment constitutes a bar, on double jeopardy grounds, to his retrial on the charge of kidnapping in the first degree. Petitioner asserts that the acquittal constitutes a final determination of his innocence of simple abduction and collaterally estops the State from later prosecuting him for first degree kidnapping (abduction plus death) of which abduction is an essential element. See Ashe v. Swenson, 397 U.S. 436 (1970).

In Ashe v. Swenson, supra, the Supreme Court held that the principle of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy, held applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969). The Court defined collateral estoppel as meaning "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. When a petitioner claims that a present prosecution is barred by a previous verdict, the burden is on him to show that the prior verdict "necessarily decided the issues raised in the second prosecution." United States v. Gugliaro, 501 F. 2d 68, 70 (2d Cir. 1974); United States v. Tramunti, 500 F. 2d 1334, 1346 (2d Cir. 1974).

Petitioner's reliance on Ashe is misplaced for the simple reason that it is impossible to ascertain if the ultimate issue of fact (simple abduction) was ever finally determined by the jury. An examination of the record in the instant case reveals that there is no certainty at all that the jury acquitted petitioner of the charge of simple abduction.

Although petitioner would have this Court recognize his acquittal of second degree kidnapping under count three, he asks at the same time that the jury's disagreement as to

the same charge under count four be ignored. As both the state court and District Court stated, the jury verdict must be viewed in its entirety.

An examination of the verdict reveals that there was never any agreement by the jury as to petitioner's guilt or innocence of simple abduction. The trial court charged that kidnapping in the second degree was the same crime (simple abduction) under both count three and count four. The jury was evidently confused since it twice returned to the trial judge for the definitions of kidnapping in the first and second degrees. The jury then returned a verdict of acquittal under count 3 and deadlock under count 4. It is manifest that the jury did not understand the meaning of kidnapping in the second degree or it could not possibly have reached these inconsistent conclusions. If the jury had actually found petitioner guilty of simple abduction under count three, it could not have deadlocked under count four since the acquittal would have automatically precluded a finding of guilty of kidnapping in the first or second degree under count 4.*

* The District Court suggested (at 7-8) that the trial court's charge of kidnapping in the second degree under both counts may have led the jury to consider the additional elements of kidnapping in the first degree (sexual abuse or death) in considering second degree kidnapping under each count. This seems to be a likely explanation for their inconsistent conclusions.

The jury in petitioner's trial was stating at the same time that the defendant was not guilty of simple abduction and that they could not decide if he was innocent or guilty of simple abduction. The end result was that the jury brought in no more than a "confused, inconsistent and repugnant verdict" (District Court Opinion at 8). This "non-verdict" establishes that the jury never resolved the issue of simple abduction in petitioner's favor. In light of the circumstances, it cannot be said that petitioner was ever "acquitted" of kidnapping in the second degree.

In applying the double jeopardy clause to any particular case, considerations of fairness to the public must be weighed against the defendant's interest in not experiencing a second trial. In Illinois v. Sommerville, 410 U.S. 458 (1973), the Supreme Court rejected the double jeopardy claim of a defendant who was retried after a mistrial which was declared because of a defective indictment which could not otherwise be cured under state law. The Court rejected the contention that such technical errors should bar reprosecution, reiterating that there is a public interest "in fair trials designed to end in just judgments" and that a rigid application of the double jeopardy clause would frustrate "the purpose of law to protect society

from those guilty of crimes." Id. at 470. The interest of defendants must sometimes yield to the interest of the public. See also United States v. Jorn, 400 U.S. 470, 480, 484 (1971); Wade v. Hunter, 336 U.S. 684, 688-89 (1949).

In a case of first impression before this Court, United States ex rel. Jackson v. Follette, 462 F. 2d 1041 (2d Cir.), cert. den. 409 U.S. 1045 (1972), a petitioner was charged with premeditated murder and felony murder at his first trial. The jury was instructed to render a verdict on only one charge and remain silent on the other. Petitioner was convicted of premeditated murder. After the landmark decision in Jackson v. Denno, 378 U.S. 368 (1964) (in which the same petitioner was before the Supreme Court), petitioner was retried on the same two charges. The instructions to the jury were the same. Petitioner was convicted of felony murder at the second trial. Raising numerous double jeopardy claims (462 F. 2d 1044-45), including the contention that the first jury might have acquitted him of felony murder before convicting him of premeditated murder a writ of habeas corpus. Considering the elements of fairness to the public and lack of substantial unfairness to the petitioner, this Court affirmed the denial of the application.

In so doing, this Court said:

> "We have, in short, a case that is sui generis, not controlled by any Supreme Court case on its facts, and not capable of simple resolution either on an historical or logical basis. Without disregarding the teachings of history or of the cases, we come to the point where we must weigh on a fine scale the competing interests of the public and petitioner. We must strike a balance between fairness to society in obtaining a verdict on a proper indictment and the avoidance of undue vexation to the defendant by a retrial..." (footnotes omitted) Id. at 1049.

These considerations were recalled by Judge Lumbard in his dissent in United States v. Jenkins, 490 F. 2d 868 (2d Cir. 1973), cert. granted, 417 U.S. 908 (1974):

> "...it is my view that the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case. As Judge Friendly's thoroughgoing history of the Clause reveals, its evolution has been clouded with contradictions, inconsistencies, and uncertainties. It would be a serious mistake to adhere slavishly to a rigid application of this fifth amendment protection. An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harrassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice." (footnote omitted) Id. at 484.

Since it is obvious that the jury at petitioner's first trial failed to render a dispositive, adequate, or accurate finding as to petitioner's guilt or innocence of simple abduction, petitioner has not met his burden of proving that the jury necessarily acquitted him of simple abduction (ante at 14). Moreover, petitioner failed to object to the instructions as given or to the discharge of the jury and restoration of the fourth count to the calendar (see District Court Opinion at 9; United States ex rel. Jackson v. Follette, supra at 1052-53). Petitioner has never claimed that there was any manipulation by the prosecution, that there was undue delay in reprosecuting him, or that the prosecution had an opportunity to strengthen its case.* See Illinois v. Sommerville, supra at 469. In light of these facts and weighing the interests of the public against petitioner's interests, petitioner's reprosecution was not barred by the double jeopardy clause.

* Indeed, petitioner conceded in his District Court memorandum that his conviction at his retrial was based on "substantially the same evidence" presented at the first trial (at 5).

POINT II

THE JUDGE AT PETITIONER'S FIRST TRIAL EXERCISED SOUND DISCRETION IN DECLARING A MISTRIAL, AND ACCORDINGLY PETITIONER'S RIGHT AGAINST DOUBLE JEOPARDY WAS NOT VIOLATED BY HIS REPROSECUTION.

Citing United States v. Jorn, 400 U.S. 470 (1971), petitioner also contends that his right against double jeopardy was violated by his reprosecution for kidnapping in the first degree (abduction plus death) because the judge at his first trial improperly declared a mistrial as to this count. This Court has previously indicated that this claim "is a weak one on the merits." United States ex rel. Rogers v. LaVallee, 463 F. 2d at 187. Further consideration at this time demonstrates that it is lacking in merit.

In United States v. Jorn, supra, the Supreme Court reiterated the rule that before declaring a mistrial sua sponte, the trial judge should exercise sound discretion to assure that there is a "manifest necessity" for the action and that the ends of justice would not be served by a continuation of deliberations. United States v. Perez, 22 U.S. (9 Wheaton) 579 (1824). A jury's failure to agree on a verdict is "the classic example" of manifest necessity for a mistrial. Downum v. United States, 372 U.S. 734, 736 (1963). When the trial court properly exercises its discretion in declaring a mistrial, a defendant

may be retried without violation of his rights under the double jeopardy clause. E.g. United States v. Perez, 22 U.S. at 580; Green v. United States, 355 U.S. 184, 188 (1957); Wade v. Hunter, 336 U.S. 684, 688-89 (1949); United States v. Castellanos, 478 F. 2d 749, 751 (2d Cir. 1973).

United States v. Perez, supra at 580, sets forth the standards for determining whether or not the trial court has properly exercised its discretion:

> "[T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

The inquiry is a factual one (United States v. Castellanos, supra at 751), and each case must turn on its own facts. E.g. Illinois v. Sommerville, supra at 462; United States v. Goldstein, 479 F. 2d 1061, 1068 (2d Cir.) cert. den. 414 U.S. 873 (1973).

In the instant case the first trial lasted approximately nineteen days and the jury deliberated for two days before deadlocking. Twice during the deliberations the jury

requested the instructions on first and second degree kidnapping, demonstrating its confusion on these charges. When the jury first returned to announce its disagreement on count four, the judge sent them back for further deliberations. When the jury returned still deadlocked, it was polled by the Court. Only then did the judge make a finding that the jury disagreed and order them discharged (ante at 6-8). Petitioner's counsel raised no objection at any time (compare Phillips v. United States, 431 F. 2d 949 [3rd Cir. 1970] with United States v. Goldstein, supra at 1067 n. 11); nor has petitioner suggested that he was prevented from doing so. See United States v. Jorn, supra at 487. The jury never indicated that it might reach a verdict if given more time for deliberations. In light of all these factors, it is clear that the trial court did not abuse its discretion in declaring a mistrial.

In United States v. Goldstein, supra, a jury deliberated for only eight hours on eighteen counts of an indictment, after a month-long trial involving complex evidence and factual issues. This Court held that the trial court's declaration of a mistrial was proper, even if the defendant failed to consent, when the jury had twice reported itself deadlocked

and there was no indication that the jury could reach a verdict. Id. at 1068-69.

Similarly, the Seventh Circuit held that there was manifest necessity for the declaration of a mistrial when a jury deliberated one and a half days on an eleven count indictment; twice declared itself deadlocked; and showed no signs that further deliberations might result in agreement. United States v. Medansky, 486 F. 2d 807, 812 (7th Cir. 1973), cert. den. 415 U.S. 989 (1974). See also Moore v. Cardwell, 367 F. Supp. 1190 (D. Ariz. 1973) (declaration of a mistrial upheld after twelve hours deliberation after twelve day trial when only one juror felt verdict might be reached). Compare United States ex rel. Russo v. Superior Court, 483 F. 2d 7 (3rd Cir.), cert. den. 414 U.S. 1023 (1973) (trial judge abused discretion when he declared mistrial on the grounds that the jury was exhausted, when there was no support in the record for this conclusion and no inquiry into jury's progress) and United States v. Lansdown, 460 F. 2d 164 (4th Cir. 1970) (declaration of a mistrial was improper when jury foreman informed judge that they were "on the verge of a verdict" and another juror requested additional time).

The judge at petitioner's trial had ample evidence upon which to base his finding that the jury could not reach an agreement. In light of this, as well as petitioner's failure to object, the declaration of a mistrial was well within the trial court's discretion.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DENYING PETITIONER'S HABEAS CORPUS APPLICATION SHOULD BE AFFIRMED.

Dated: New York, New York
February 14, 1975

Respectfully submitted,

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EXHIBIT

MEMORANDUM

SUPREME COURT : KINGS COUNTY (CRIMINAL TERM, PART 12)

THE PEOPLE OF THE STATE OF NEW YORK

vs.

JAMES W. ROGERS

By DAMIANI, J.

Dated February 8, 19 73

Indictment No. 217/1969

Defendant is presently confined in State Prison where he is serving a 20-year to life sentence after having been convicted in this court on May 15, 1970 of kidnapping in the first degree. In July 1971 defendant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of New York alleging that his conviction violated his constitutional rights against double jeopardy. The District Court by order dated August 31, 1971 denied the petition on the ground of insufficient factual support for the alleged claims. Thereafter, counsel was assigned and defendant was granted leave to appeal to the Circuit Court of Appeals for the Second Circuit. On the appeal, the matter was remanded to the District Court for dismissal of the petition in order to permit exhaustion of state remedies (U.S. ex rel James W. Rogers v. La Vallee, 463 F. 2d 185 [2d Cir. 1972]).

Thereafter, defendant filed the instant petition for a writ of habeas corpus in the Supreme Court of Dutchess County which was referred to this court on the ground that the issues raised herein fall within the provisions of Article 440 CPL, and should be determined in the court of conviction.

The relevant facts prior to defendant's conviction are as follows:

In 1969, the grand jury of Kings County returned an indictment against defendant for the abduction and death of a 16-month old child. Defendant was charged in four separate counts with (1) Felony Murder; (2) Common-law Murder; (3) Kidnapping in the First Degree (abduction plus restraint for more than 12 hours with intent to inflict physical injury and violate her sexually); and (4) Kidnapping in the First Degree (abduction plus death of the victim during abduction). Under Count 3 and Count 4, the trial court also charged the crime of Kidnapping in the Second Degree (abduction).

At the trial, after twice requesting clarifying instructions by the court with respect to the charges of first and second degree kidnapping, the jury announced its verdict of not guilty on Count 1, Felony Murder; Count 2, Common-law Murder; and Count 3, both as to Kidnapping in the First and Second Degree. However, as to Count 4, the jury stated it was deadlocked on the charges of both first and second degree kidnapping. The trial judge directed further deliberation on the charges under count 4, but the jury was still unable to agree on a verdict. Thereupon, the court, without objection on the part of the defendant, polled the jury, determined it did "not agree" and restored the case to the calendar for a new trial on Count 4.

Upon the second trial in May 1970, defendant was found guilty of first degree kidnapping as charged in the fourth count. His conviction was affirmed without opinion by the Appellate Division (People v. Rogers, 36 A D 2d 1024). Leave to appeal to the Court of Appeals was denied on July 6, 1971 and the Supreme Court of the United States denied certiorari on February 28, 1972 (405 U.S. 956).

In his habeas corpus petition to the United States District Court, defendant claimed his conviction was invalid on two grounds. Firstly, he contended that since he was acquitted by the jury at the first trial of the charge of second degree kidnapping (abduction) under the third count, the prosecution was prohibited by the double jeopardy clause of the Constitution from later trying him for first degree kidnapping on the fourth count. Secondly, he claimed the court at the first trial improperly declared a mistrial on the fourth count and that the second trial was prohibited on the same ground of double jeopardy.

It appears that although at various times during the proceedings on the second trial and on appeal, defendant raised the issue of double jeopardy, he claims "the issue was never properly presented nor understood for the reason that the transcript of the charge to the jury [at the first trial] . . . was not available." (Pet. p. 3). Apparently, the transcript was first produced in the Circuit Court pursuant to an order of that court dated December 2, 1971. The Circuit

Court in its opinion stated that the "state courts here were never fully advised and aware that the trial judge at appellant's first trial had instructed the jurors that they could consider whether appellant was guilty of the lesser offense of second degree kidnapping or that the jury actually found appellant innocent of that crime." (p. 187).

The court alluded to the fact that defendant did raise a double jeopardy issue in the state courts and expressed the opinion that because the crime was "so repulsive, the issue of state-federal relationship so delicate, and the double jeopardy claim so unusual and not without difficulty," that the state courts should have the opportunity of making the first determination on a full record. (p. 187.)

With respect to the defendant's second claim that the declaration of a mistrial on the Fourth Count was improper, the court, although of the belief that the claim was a "weak one," considered that exhaustion of state remedies was also the preferable course on this ground.

On January 3, 1973 the instant petition was referred to the Justice of this court who presided at the second trial, who disqualified himself on the ground that he was "in no position to make a determination objectively." In accordance with the rules of this court, the matter was referred to the undersigned.

On oral argument held on January 22, 1973, counsel agreed that only a question of law was involved herein and that no factual hearing was required.

It is defendant's contention that his acquittal on the Third Count "should have terminated the case for all purposes since it was an acquittal of kidnapping in the first degree and of kidnapping in the second degree and the jury should have had no need to deliberate on the fourth count." (Brief p.6).

There is no merit to defendant's contention concerning his acquittal of kidnapping in the first degree. Defendant was charged under Count 3 with kidnapping in the first degree pursuant to Subd. 2(a) of Sec. 135.25 of the Penal Law, i.e., abduction plus restraint for more than twelve hours with intent to inflict physical injury and violate the victim sexually.

Under Count 4 defendant was charged with kidnapping in the first degree pursuant to Subd. 3 of the same section of the Penal Law, i.e., abduction where death results.

Obviously, defendant's acquittal of kidnapping in the first degree under Count 3 could not preclude defendant's retrial under Count 4 in view of the fact that the elements of the crimes charged in the indictment pursuant to above subdivisions of the statute, are different and require different proof.

Defendant's contention that his acquittal of kidnapping in the second degree (abduction) precluded his retrial on Count 4 for kidnapping in the first or second degree, presents a novel and more vexatious issue. If defendant was <u>in fact</u> acquitted of kidnapping in

the second degree (abduction), then he could not be tried again for kidnapping in the first degree under Count 4 (abduction where death results) or kidnapping in the second degree (abduction).

The difficulty with defendant's position, however, is that it cannot be said with certainty that the jury acquitted defendant of kidnapping in the second degree (abduction).

In fairness to the People, the verdict of the jury must be viewed in its entirety. The jury's verdict of not guilty of abduction under Count 3 should not be isolated and considered separately from the remainder of the verdict. The fact is that the jury returned with a verdict of not guilty as to kidnapping in the second degree (abduction) under Count 3, and at the same time disagreed as to the same crime under Count 4. Concerning abduction, the jurors were in effect saying in the same breath, "we find the defendant not guilty" and "we cannot agree." This was a confused or "repugnant" verdict (see People v. Pugh, 36 A D 2d 845).

Defendant emphasizes the verdict under Count 3 and ignores the companion verdict under Count 4. The disagreement under Count 4 cannot be ignored any more than the acquittal under Count 3. Consequently, when the verdict is taken as a whole, it cannot be said that defendant was in truth and in fact acquitted of abduction at the first trial. At most, the jury rendered a confused or "repugnant" verdict.

While it is true that the trial judge did not disturb the verdict of acquittal on Count 3 or instruct the jury to reconsider its verdict under Counts 3 and 4, but instead found a "disagreement" and ordered a retrial of Count 4, defense counsel made no objection to the court's action. The result was that a "repugnant" verdict was permitted to stand by all concerned and defendant should not be permitted to interpret the verdict as one of actual acquittal. To do so would be pure speculation which should not be the basis for a claim of double jeopardy.

It is defendant's second contention that the trial court's declaration of a mistrial without defendant's consent on the Fourth Count was improper, so that defendant was subjected to double jeopardy on the second trial. It is undisputed, however, that neither defendant nor his counsel interposed any objection to the polling of the jury, the determination by the court of the jury's disagreement, the court's discharge of the jury and restoration of the case to the trial calendar. Moreover, the court records indicate that after the jury was selected the case was on trial approximately 11 days. The jury deliberated for approximately two days after being sequestered overnight. During its deliberations the jury was given further instructions on four occasions and twice stated it could not agree. Under all the circumstances of this case, it is my opinion that there was no abuse of discretion on the part of the trial judge in declaring a mistrial.

Accordingly, defendant's motion is in all respects denied.

The Clerk is directed to prepare an order in accordance with this decision and to serve a copy of this order, when signed, together with a copy of this decision, upon the district attorney, the attorney for the defendant, and the defendant at the place where he is presently incarcerated.

J. S. C.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JEANETTE MARCELINA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee herein. on the 14th day of February , 1975 , she served the annexed upon the following named person :

Lois Goodman, Esq.
Project for Prisoners' Rights
University of Syracuse College of Law
721 Ostrom Avenue
Syracuse, New York 13210

Attorney in the within entitled proceeding by depositing Three copies a true and correct ~~copy~~ thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Jeanette Marcelina

Sworn to before me this
14th day of February , 1975

Margery Evans Reifler
Assistant Attorney General
of the State of New York